IN THE SUPREME COURT OF TEXAS

No. 14-0572

COYOTE LAKE RANCH, LLC, PETITIONER,

v.

THE CITY OF LUBBOCK, RESPONDENT

ON PETITION FOR REVIEW FROM THE COURT OF APPEALS FOR THE SEVENTH DISTRICT OF TEXAS

JUSTICE BOYD, joined by JUSTICE WILLETT and JUSTICE LEHRMANN, concurring.

"Absent an agreement to the contrary, an oil-and-gas lessee has an implied right to use the land as reasonably necessary to produce and remove the minerals but must exercise that right with due regard for the landowner's rights." *Ante* at ____. This is the common-law "accommodation doctrine," and it is a well-established tenet of our oil-and-gas jurisprudence. *See Merriman v. XTO Energy, Inc.*, 407 S.W.3d 244, 249 (Tex. 2013); *Tarrant Cty. Water Control & Imp. Dist. No. One v. Haupt, Inc.*, 854 S.W.2d 909, 911 (Tex. 1993); *Getty Oil Co. v. Jones*, 470 S.W.2d 618, 621 (Tex. 1971). Addressing an issue of first impression, the Court announces in this case that the "similarities between mineral and groundwater estates, as well as in their conflicts with surface estates, persuade us to extend the accommodation doctrine to groundwater interests." *Ante* at ___. The Court thus holds "that the accommodation doctrine applies to resolve conflicts between a severed groundwater estate and the surface estate that are not governed by the express terms of the parties' agreement." *Ante* at ___.

I agree, but the key to the Court's holding is that the accommodation doctrine only applies to groundwater rights—just as it only applies to mineral rights—when the parties' dispute is "not governed by the express terms of the parties' agreement." *Ante* at ____. When the parties' agreement expressly addresses the dispute, it is unnecessary and improper for courts to imply rights and obligations through the accommodation doctrine. As the Court explains, the "parties have the right to contract as they see fit as long as their agreement does not violate the law or public policy," and this rule "applies to a mineral owner's use of land." *Ante* at ____.¹ When a lease or deed expressly describes the disputed rights, "we may neither rewrite the parties' contract nor add to its language." *Am. Mfrs. Mut. Ins. Co. v. Schaefer*, 124 S.W.3d 154, 162 (Tex. 2003).

In this case, I conclude that the parties' primary dispute is "governed by the express terms of" the deed through which the City obtained its groundwater rights. In that deed, the Ranch expressly conveyed to the City not only the right to the "water in, under and that may be produced from" the land, and the "exclusive right to take such water from said tracts of land," but also:

- "the full and exclusive rights of ingress and egress in, over, and on said lands, so that the [City] may at any time and location drill water wells and test wells on said lands for the purpose of investigating, exploring, producing, and getting access to percolating and underground water;"
- "the rights to string, lay, construct, and maintain water and fuel pipe lines and trunk, collector, and distribution water lines, power lines, communication lines, air vents with barricades, observation wells with the barricades, if required, not exceeding ten (10) square feet of surface area, reservoirs, booster stations, houses for employees, and access roads on,

¹ See Sun Oil Co. v. Whitaker, 483 S.W.2d 808, 811 (Tex. 1972) ("The rights implied from the grant are implied by law in all conveyances of the mineral estate and, absent an express limitation thereon, are not to be altered by evidence that the parties to a particular instrument of conveyance did not intend the legal consequences of the grant."); Getty Oil, 470 S.W.2d at 621 (applying accommodation doctrine to resolve complaint about lessee's use of tall oil pumps because the "lease contains no specific provision concerning the vertical usage of the land"); Humble Oil & Ref. Co. v. Williams, 420 S.W.2d 133, 134–35 (Tex. 1967) (applying accommodation doctrine because lease agreement lacked any provision requiring lessee to "pay for damages to land, trees[,] and cattle, and that such provisions are enforceable whether [or] not the damage or destruction is occasioned by a reasonable use of the land").

- over and under said lands necessary or incidental to any of said operations"; and
- "the rights to use all that part of said lands necessary or incidental to the taking of percolating and underground water and the production, treating and transmission of water therefrom"

(Emphases added.)

Exercising these rights, the City developed a plan to draw substantially more water by drilling up to eighty additional wells in various locations. After the City selected the well sites and began mowing paths to access those sites, the Ranch filed suit and obtained a temporary injunction prohibiting the City from drilling any wells without first consulting the Ranch, mowing or otherwise destroying the native grass, and erecting power lines to the proposed well sites. The court of appeals reversed the temporary injunction, holding that the accommodation doctrine does not apply to groundwater leases and that the deed expressly permits the City to engage in the activities that the injunction prohibits. 440 S.W.3d 267, 272–73 (Tex. App.—Amarillo 2014).

The Court affirms, but it concludes that the accommodation doctrine applies in this case because the deed is "simply silent" on the parties' disagreement and "does not resolve this dispute" or "determine [the City's] rights to use the Ranch." *Ante* at ____. In the Court's view, "the deed leaves unclear whether the City can do everything necessary or incidental to drilling anywhere, as it claims, or only what is necessary or incidental to fully access the groundwater, as the Ranch argues." *Ante* at ____.

I disagree. The Ranch's position is that the accommodation doctrine requires the City to adopt "an alternative plan for different well sites and fewer roads." *Ante* at ____. The deed, however, expressly grants the City the right to drill water wells "at any time and location . . . for the purpose of" accessing the groundwater. If the City chooses to drill sixty new water wells, the deed expressly

grants the City that right. And if the City chooses to drill those wells where native grass grows on sand dunes, the deed expressly grants the City that right. Because the express terms of the parties' agreement address the issue, the accommodation doctrine does not apply and the Ranch cannot rely on the doctrine to require the City to adopt an alternative plan for different well sites.

I do agree, however, that the accommodation doctrine may apply to the issue of where and how the City can construct access roads, as opposed to the issue of where it may locate wells. Although the deed grants the City the right to drill wells anywhere and at any time, it permits the City to construct access roads and other improvements only as "necessary or incidental" to its operations and to otherwise use the land only as "necessary or incidental" to taking water at those sites. Because phrases like "necessary or incidental," "necessary or useful," and "necessary and convenient" leave substantial room for disagreement, we have applied the accommodation doctrine to inform their meanings by imposing a reasonableness standard on the uses the agreements permit. *See, e.g., Merriman,* 407 S.W.3d at 249 (applying the accommodation doctrine to a lease that permitted the lessee to use the surface as necessary or useful in its operations); *Moser v. U.S. Steel Corp.,* 676 S.W.2d 99, 100, 103 (Tex. 1984) (applying the accommodation doctrine when deed conveyed "all necessary and convenient easements for the purpose of" the mineral estate).

Thus, to the extent the Ranch contends that the City's paths, roads, and power lines are not "necessary or incidental" to the taking of water from the well sites the City has selected, I agree that the trial court should apply the accommodation doctrine on remand to resolve that issue. But to the extent that the Ranch seeks to require the City to select different or fewer well sites, the

accommodation doctrine does not apply because the deed expressly grants the City the right to drill water wells "at any time and location."

Jeffrey S. Boyd Justice

Opinion delivered: May 27, 2016